HONG LEONG FINANCE BHD.

v.

YAP YONG SEONG

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. C23-858-86]
31 MARCH 1989

CIVIL PROCEDURE: *Summary judgment - Dismissed - Appeal to Judge - Interpretation of Clause 7 of the guarantee - Doctrine of merger.*

The plaintiff took out an O. 14 application against the defendant. The Senior Assistant Registrar dismissed the application. The plaintiff appealed to the Judge.

The first issue was the interpretation to be given to Clause 7 of the guarantee. The second issue was whether the doctrine of merger applied to discharge the defendant from his personal liability to make payment.

Held:

[1] In interpreting a deed like a guarantee, due regard must be given to the guarantee as a whole in order to ascertain the true meaning and intention of the parties.

[2] In this case, the plaintiff could make a demand for repayment of the full sum due under Clause 7 of the guarantee.

[3] The doctrine of merger has to enforce a charge. As such, the defendant cannot plead merger, as a means of escaping liability under the guarantee.

[Appeal allowed with costs.]

Cases referred to:

Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] CLJ (Rep) 349
American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd. [1973] 1 MLJ 95
Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd. [1988] 1 CLJ (Rep) 193

Legislation referred to:

Rules of the High Court 1980, O. 14

For the plaintiff/appellant - B.R. Seth; M/s. Shearn Delamore & Co.
For the defendant/respondent - K.S. Narayanan; M/s. K.S. Narayanan Associates

JUDGMENT

Siti Norma Yaakob J:

The defendant in this suit had signed a guarantee in favour of the plaintiff in consideration of the plaintiff granting a bridging loan of RM1,950,000 to a housing development company called Centenary Realty Sdn. Bhd. (the principal borrower). Apart from the defendant's guarantee, the principal borrower had also charged to the plaintiff the same piece of land the development of which was being financed by the plaintiff through the granting of the bridging loan.

The principal borrower defaulted in its obligation to make repayment of the loan and by filing this suit, the plaintiffs seek to enforce the guarantee against the defendant on his personal covenant to make repayment.

Before the Senior Assistant Registrar, the plaintiff however failed in their application for summary judgment under O. 14 and in this appeal before me, only 2 issues were raised namely (1) the interpretation to be given to Clause 7 of the guarantee and (2) that the doctrine of merger applies as to discharge the defendant from his personal liability to make repayment.

It is not disputed that when the O. 14 application was pending, the plaintiff had commenced foreclosure proceedings in Sabah against the principal borrower to have the land charged, sold under the provisions of the Sabah Land Ordinance 1930 to satisfy the amount due on the loan. An order for sale was subsequently granted and the land was auctioned on 23 March 1987 for RM876,000, a sum which was not sufficient to settle the amount due from the principal borrower in full.

By virtue of this sale, the defendant contends that Clause 7 of the guarantee operates to regulate the manner in which the balance of the sum due to the plaintiff from the principal borrower, can be claimed against him. It is his contention that his liability to meet the balance of the loan is contingent upon the plaintiff issuing him with a proper demand to pay and in this case, the only demand made by the plaintiff to him, dated 12 January 1986 is not the proper demand envisaged by Clause 7 as that demand was made before the foreclosure proceedings were commenced and completed and that the demand was for the total amount loan due. It is the defendant's contention that a fresh demand should have been made for the balance outstanding after due credit has been given from the proceeds of sale of the land. Since this was not done, there was no proper demand made and he cannot be held liable under Clause 7 to meet payment for the balance of the loan.

In interpreting a deed like a guarantee, due regard must be given to the guarantee as a whole in order to ascertain the true meaning and intention of the parties as expressed by the several clauses in the guarantee, and that the words and expression of each clause must be so interpreted to bring them into harmony with the other provisions of the guarantee.

Clause 1 of the guarantee contains a principal debtor clause by which the defendant guarantees repayment of the loan not merely as a surety but as a principal debtor.

Clause 2 entitles the plaintiff to demand repayment in full from the defendant, in the event the principal borrower defaults in meeting its obligations is the charge documents, notwithstanding anything to the contrary contained in such documents.

Clause 3 goes to state further the defendant's liability to indemnify the plaintiff and successors in title against all losses, damages and costs incurred by the plaintiff by reason of the default of the principal borrower.

Clause 4 states that the obligations of the defendant shall only be discharged by performance and such obligations shall not be subject to any prior notice or demand to the defendant with regard to any default of the principal borrower and shall not be impaired by any extension of time, forbearance or concession of any right against the principal borrower in respect of any security created. In other words, whatever happens, the defendant is liable.

Clause 5 gives the plaintiff absolute liberty, without effecting the defendant, to grant the principal borrower any time, indulgence for the repayment of the loan or to vary, substitute or reduce any security held by the plaintiff.

Clause 6 states that all moneys received from the principal borrower or from the realisation of any security shall not be appropriated or attributed to any specific part of the loan. By this cause the defendant has also declared that he will not make any claim against the principal borrower in respect of moneys paid by him to the plaintiff unless and until the plaintiff has received all sums due in full.

Coming to Clause 7 which is relied on by the defendant, I reproduce the clause which is as follows:

> In the event of the lender exercising its right of sale or assigning its rights in and to the proceeds of such sale or assignment after deducting all the expenses thereof and incidental thereto (hereinafter referred to as 'the net proceeds') be insufficient to pay all moneys due and owing to the lender from the borrower, the guarantor shall, upon demand by the lender, forthwith pay to the lender a sum representing the difference between the net proceeds and the moneys then due and owing from the borrower to the lender.

Clause 8 confirm that the liability of the defendant will not be affected by any arrangements entered or composition accepted by the plaintiff pursuant to the charge documents, with or without the consent of the defendant.

Lastly I come to cl. 9 which effect confirms that even if there has been a receipt of money from the proceeds of sale of the hands of the plaintiff which reduces the loan, this does not discharge the defendant of his liability has received payment in full.

I go no further than the first 9 clauses in the guarantee to show that all these 9 clauses must be read together to show the true meaning as to the intention of the parties regarding their respective right and obligations under the guarantee. Thus to take Clause 7 in isolation and to give it a literal meaning without due regard to the other clauses, specially Clauses 1, 2, 4 and 9, would go against the very intention and spirit for which the guarantee was intended and executed in the first place. By the words and expressions used in the clauses I have referred to above, there is every intention at all costs to make the defendant personally liable to repay the loan in the event the principle borrower defaults in meeting its primary obligation to pay.

It is true that Clause 7 specifically covers the situation when another security has been enforced which however is insufficient to settle the loan in full but this does not mean that the provisions of Clause 7 are contrary to the provisions of Clause 7 are contrary to the provisions of Clause 2 which is a general clause covering the situation when there has not been any part payment towards the loan. These 2 clauses complement each other but before the 2 clauses can be resorted to, there is the requirement that the plaintiff must take a demand for repayment of the full sum due under Clause 2 or for the balance due under Clause 7.

In this case, only one demand was made, that under Clause 2 on 12 January 1986 which the defendant now states is ineffective as at the time when such a notice was sent, foreclosure proceedings had not commenced and since that demand was for the full sum, it cannot be regarded as a demand for the balance sum due under Clause 7. He contends further that the moment the auction was held, and the balance of the proceeds of sale ascertained for which credit can be given to account for the principle borrower's indebtedness, a fresh demand should be made to the defendant for the balance of loan outstanding.

I do not consider there is any necessity to issue a fresh demand bearing in mind that the liability of the defendant is established once there is default on the part of the principal borrower be it for the full loan outstanding or for the balance of loan outstandings. In this matter, it is not the case that the plaintiff had not made any demand at all, but that other events had occurred to reduce the extent of the defendant's liability under the guarantee. Under these circumstances, I consider that the only notice given is just as good a notice as any under Clause 7 and to that end, a fresh demand is not necessary.

Even if I am wrong on this, the provisions of the principal debtor clause in Clause 1 of the guarantee obviates the necessity as the issuance of the writ itself is considered a good and proper demand.

On the issue of merger, the defendant contends that since the order of sale is a judgment, his personal liability under the guarantee has been extinguished as it has merged with the order of sale. For this contention, the defendant relies on the Supreme Court decision in the case of *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1897] CLJ (Rep) 349, which overruled an earlier decision in the case of *American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 MLJ 95 that held that merger does not apply where a chargee has exercised his statutory remedy against a chargor in default.

Since the decision in *Supreme Finance*, a new development has emerged with the ruling in the more recent case of *Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* [1988] 1 CLJ (Rep) 193, where the Supreme Court held that the doctrine of merger has no application to proceedings to enforce a charge. That being the case, the defendant cannot plead merger as a means of escaping liability under the guarantee.

As the 2 issues have been summarily dealt with, I had accordingly allowed the plaintiff's appeal with costs but ordered judgment to be entered for the plaintiff at the rate claimed in the statement of claim and costs.

Also found at [1990] 1 CLJ 85